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NOTES OF RECENT CASES.

Krishnan Pandalai, J. C. R. P. No. 1904 of 1931.
18th October, 1932.

Court Fees Act (VII of 1870), S. 7 (5) and Art. 17, Sch. II—Madras Civil Courts Act, S. 14—Suits Valuation Act, S. 4—Suit to set aside claim order and for declaration that suit property belonged to judgment-debtor, brought against both judgment-debtor and decree-holder—Nature of suit—Whether suit is within the jurisdiction of Munsif's Court.

Where in a suit to set aside a claim order and for a declaration that the suit property belonged to the judgment-debtor brought as against both the decree-holder and judgment-debtor, the value for purposes of jurisdiction was fixed as the value of the decree amount and the suit was held to be within the jurisdiction of the District Munsif's Court,

Held, (1) that Art. 17, Sch II of the Court Fees Act applied to the case and even though the judgment-debtor was a party and there was a prayer for a declaration that the immoveable property belonged to the judgment-debtor, still the suit was mainly one for setting aside the claim order;

(2) that S. 14 of the Madras Civil Courts Act applied to the case and the subject-matter of the suit should be held to be land and it ought to be valued in the manner provided under S. 7, cl. (5) of the Court Fees Act, in the absence of any rules made by the Local Government under S. 4 of the Suits Valuation Act which specifically mentions Art. 17, Sch. II; and

(3) that consequently the present suit as valued under S. 7, cl. (5) of the Court Fees Act will be within the jurisdiction of the District Munsif

35 Cal. 202 (P. C.) applied.

50 Mad. 646 and 39 Mad. 602 distinguished.

K. Balasubrahmania Aiyar for Petitioner.

N. K. Mohanarangam Pillai for Respondents.

K. C.

Reilly and Cornish, JJ. A. S. No. 254 of 1926.
7th December, 1932.

Suit for declaration that adoption was invalid—Arrangement between parties that there should be a formal trial upon certain evidence placed before Court pursuant to the settlement—Court's decree upholding terms of settlement—Subsequent suit—Decree obtained previously set aside as got by fraud and collusion.

A daughter of one *R* sued *V* (*R's* widow), *L*, a boy alleged to have been adopted by *V* and her own sister, for a declaration that the adoption of *L* was invalid. The parties entered into a settlement but it was arranged as part of the settlement that the compromise should not be put into Court, but formal trial should be gone through. The Court gave findings upholding the terms of the settlement on the evidence which was placed before Court pursuant to the arrangement. Subsequently *P*, the son of *A*, brought another suit (present suit) for a declaration that the decree in the prior suit was not binding upon him as it was obtained by fraud and collusion.

Held, that the arrangement was a fraud and hence decree should be set aside.

Ch. Raghava Rao for Appellant.

V. Suryanarayana for Respondents.

K. C.

Pakenham Walsh, J. C. R. P. No. 1416 of 1932.
14th December, 1932.

Civil Procedure Code (V of 1908), Ss. 148 and 151—Conditional interim order—Default—Power to extend time.

Pending an appeal from a decree for possession and mesne profits against the defendant-tenant, the Court passed an order permitting the tenant to continue in possession on condition of the tenant paying the rent within a specified time every year. No payment was made within the time specified and the tenant applied to the Court to excuse the delay and extend the time for payment. The Lower Court allowed the application.

Held, that (*i*) it was not an order under O. 41, R. 5 (3), but one passed under S. 151 and so it was a case of an "act allowed," though not "prescribed" by the Code. A. I. R 1925 Pat. 153 dissented from.

(*ii*) that the previous conditional order in so far as it did not contain any provision for automatic dismissal of the application of the defendant on default by him, the application was still alive and that the Court had the power to extend the time. 53 M. L. J. 494 and (1896) 1 Ch. 644 distinguished.

S. Ramachandra Aiyar for Petitioner.

K. S. Sankara Aiyar for Respondent.

S. R.

Walsh, J. C. R. P. No. 1090 of 1932.
3rd January, 1933.

Decree—Execution—Decree for debts of last male owner against a widow entitled to a life-estate under the former's will—Daughter entitled to remainder under will, exonerated—Execution against daughter as legal representative of the widow seeking to sell the property in remainder—Whether maintainable—No decree against assets of deceased person but only against the debts in possession of assets of deceased.

In a suit for a sum of money due by the last male owner, a suit was brought against the widows, his daughter and others as being in possession of the properties of the deceased. Pending the suit the daughter and others were exonerated and a decree was passed after contest against the widows alone. The last male owner had executed a will by which he bequeathed the life-interest in a house to one of his widows, the 2nd defendant, and the remainder absolutely to her daughter, the 4th defendant, in the suit. Execution was taken out, of the decree, after the death of the 2nd defendant and against the 4th defendant as her legal representative seeking to bring to sale the house which she got absolutely under her father's will.

Held, that by the exoneration of the daughter, the 4th defendant, in the suit, the plaintiff was precluded from executing the decree against the house which was bequeathed for life to the widow and the remainder to the daughter. The cases, where a decree obtained against a wrong legal representative in possession of the deceased's assets was sought to be executed against a right legal representative, had no application to the present case.

50 M. L. J. 442 and 29 M. L. J. 698 distinguished.

There can be no decree as such as against the assets of a deceased person apart from the persons in possession of such assets.

Judgment in Letters Patent Appeal No. 290 of 1927 (unreported) followed.

C. A. Seshagiri Sastri for *Watrap S. Subramania Aiyar* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

K. C.

Walsh, J. C. M. S. A. No. 27 of 1929.
4th January, 1933.

Powers of executing Court—Jurisdiction to go into a question of disputed point of fact.

N R C

When there is no want of jurisdiction apparent on the face of the decree, the party in execution cannot raise a disputed point of fact, which, if his contention were true, would have deprived the Court of its jurisdiction to pass a decree in that matter.

28 Mad. 84; 45 Mad. 620 and 43 All. 547 distinguished.

T. M. Ramaswami Aiyar and *A. Nagaswami Aiyar* for Appellants.

S. Narayana Aiyangar for Respondent.

K. C.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. C. M. A. No. 296 of 1929.
5th January, 1933.

Civil Procedure Code (V of 1908), S. 145 (c)—Scope of—No order allowing next friend of a minor to receive money of minor and keep it with himself—Applicability of O. 32, R. 6 of Civil Procedure Code.

A Court merely ordered that a next friend of a minor decree-holder should be allowed to draw out the money paid into Court by the judgment-debtor in satisfaction of the decree in suit, and after deducting expenses of the suit should purchase Government Promissory Notes for the balance and deposit the same into Court. Another person executed a surety bond binding himself responsible for the said amount till the next friend deposited in Court the Government Promissory Notes. The next friend died without ever depositing any Government Promissory Notes and when the minor on attaining majority, filed an application under S. 145, Civil Procedure Code, for execution against the surety and the Lower Court dismissed it relying on 41 Mad. 40;

Held, (1) that in 41 Mad. 40 leave was granted to minor's next friend to receive and keep minor's money so that that case was one to which O. 32, R. 6 applied and the present case was distinguishable on facts;

(2) that although the suit would be at an end after payment of decree amount by the judgment-debtor, still any proceeding taken for disbursement of the said amount would be "a proceeding consequent on the suit" within the meaning of S. 145 (*c*) so that execution might be ordered against the surety under that clause of the section.

B. Satyanarayana for Appellant.

Y. Suryanarayana and *Kasturi Seshagiri Rao* for Respondents.

K. C.

Curgenven, J. C. R. P. No. 736 of 1931.
7th December, 1932.

Arbitration—Award—Arbitrators extending enquiry beyond scope of pleadings—Validity—Consent of parties whether cures defect—Civil Procedure Code, 1908, O. 32, R. 7—Guardian being party to arbitration—Omission to obtain sanction of Court—Right to object to award.

When a dispute is referred to arbitrators through Court the scope of the enquiry is the scope of the suit itself as disclosed by the pleadings and they have no jurisdiction to extend it either as regards the subject-matter or the persons affected by it. Where an award is vitiated by the circumstance that it departs from the pleadings it cannot be cured by the valid consent of all the parties. The arbitrators who exceed their duty and the Court which nevertheless passes a decree in terms of the award would be acting in excess of jurisdiction so as to justify the High Court's interference in revision.

53 Cal. 258 (P. C.) and 49 M. L. J. 523 relied on.

Where the guardian of a minor enters into an agreement and submits to arbitration he cannot subsequently turn round and impeach the award on the ground that the sanction of the Court had not been obtained under O. 32, R. 7, Civil Procedure Code.

58 Cal. 628 relied on.

P. Satyanarayana Rao for Petitioner.

G. Lakshmanna, G. Chandrasekhara Sastri, K. Kottayya, V. Krishna Mohan, J. Sambasiva Rao and *N. V. Shiva Rao* for Respondents.

B. V. V.

Madhavan Nair and Jackson, JJ. A. S. No. 373 of 1926.
15th December, 1932.

Transfer of Property Act (IV of 1882), S. 6 (e)*—Rights of Hindu reversioner—Agreement to transfer—Effect—Suit for refund of purchase money advanced—Limitation Act, 1908, Art. 62.*

An agreement for the sale of the rights of a Hindu reversioner to be carried out after the death of the widow is merely an agreement for the sale of an expectancy or *spes successionis* and is therefore void. In such a case a claim for refund of the purchase money paid in pursuance of the agreement will be governed by Art. 62 of the Limitation Act and the period commences to run from the date of the agreement itself.

48 M. L. J. 598 and 50 Cal. 929 relied on.

45 All. 179 distinguished.

N. R. C.

P. V. Vallabhacharyalu for Appellants.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

B. V. V.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. A. S. No. 367 of 1928.

9th January, 1933.

Penalty—Mortgage bond—Interest at 12 per cent.—On default interest at 13½ per cent. compound—If penal—Creditor if entitled to compound interest at the original 12 per cent. at least.

A mortgage bond provided for repayment of the mortgage amount at the end of one year with interest at 12 per cent. per annum and in default compound interest at 13½ per cent. per annum was provided for.

Held, by the Full Bench, that the provision for payment of compound interest at an enhanced rate was penal; that such provision cannot be split up into two, consisting of a provision for compound interest at the original rate and a provision for a higher rate of interest so as to uphold the first by itself and that though the Court may in its discretion award compound interest at the original rate by way of compensation, the creditor was not as a matter of right entitled to the award of compound interest.

S. Varadachariar, T. Ramachandra Rao and *A. Venkatachellam* for Appellant.

Alladi Krishnaswami Aiyar and *B. Satyanarayana* for Respondents.

S. V. V.

Pakenham Walsh, J. C. M. S. A. No. 34 of 1928.

10th January, 1933.

Limitation Act (IX of 1908), Art. 182 (5)—Step-in-aid of execution—Application for time to file application for substituted service—Limitation if saved—Plea of limitation—Need for setting out grounds in execution application—Dismissal of application for non-payment of batta—Revival.

An application for a step-in-aid of execution must satisfy two conditions: the step must be one to be taken by the Court and the applicant should ask the Court to take it. An application for time to file an application for substituted service is not a step-in-aid so as to save limitation.

51 M. L. J. 480 and 53 M. L. J. 766 relied on.

Every ground of exemption from limitation must be specifically set out in the execution application and a ground not so set out cannot be relied on.

An execution application can be dismissed for non-payment of batta and such dismissal is not a dismissal for statistical purposes so as to be revived by a later application.

4 L. W. 112 followed.

S. R. Muthusami Aiyar for Appellant.

A. Nagaswami Aiyar for Respondent.

B. V. V.

Pakenham Walsh, J. C. R. P. No. 534 of 1928.
11th January, 1933.

Execution—Sureties executing bond—Non-compliance with order of Court—Application for arrest of sureties—Procedure.

Where the properties of a judgment-debtor were attached and certain sureties executed a bond for the production of the articles and the decree-holder subsequently applied for the arrest of the sureties on the ground that they did not produce the articles,

Held, that the application for the arrest of the sureties could not be made in the absence of an order of Court under the bond in an application to which the sureties were parties.

42 All. 171 (P. C.) and 51 M. L. J. 239 referred to.

T. R. Srinivasa Aiyangar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 168 of 1930
17th January, 1933. and
C. R. P. No. 1232 of 1928.

Civil Procedure Code (V of 1908), Ss. 47 and 151 and O. 21, R. 90—Sale in execution of decree—Refusal to confirm sale—Appeal and second appeal, whether lie—Sale of more lots of properties than would satisfy decree-holder—Court's powers under S. 151 of the Civil Procedure Code to refuse to accept bids when notice of the fact of more lots than necessary being sold, not brought to it.

Where the executing Court refuses to confirm a sale in execution under its inherent power and not under O. 21, R. 90, Civil Procedure Code, an appeal and a second appeal lie against the order of the executing Court.

47 M. L. J. 549 followed.

Where the executing Court instructed the Deputy Nazar to sell only so much of the properties of the judgment-debtor as would suffice to satisfy the decree but the latter sold more, while the sale of

some of the lots only would satisfy the decree, which fact was not brought to the notice of the Court which in consequence accepted the bids of all the properties, the Court can refuse to confirm the sale of more properties than are needed to satisfy the decree under its inherent powers reserved under S. 151 of the Civil Procedure Code.

Case-law reviewed.

23 W. R. 1 and 393 distinguished.

C. A. Seshagiri Sastri for Appellant.

S. Rajarama Aiyar for Respondent.

K. C.

Pakenham Walsh, J. C. M. S. A. No. 147 of 1929.
18th January, 1933.

Provincial Insolvency Act (V of 1920), Ss. 4 and 68—Claim application enquired into with consent of parties by the Official Receiver and disallowed—Application under S. 4 to the Insolvency Court impugning jurisdiction of Official Receiver—Jurisdiction—Whether S. 4 gave powers to Court—Official Receiver not a Court but an executive officer—Insolvency Court's jurisdiction to set right Official Receiver's mistakes.

A claim petition was enquired into by an Official Receiver by consent of parties and the claim was disallowed. A fresh application was filed by the claimant under S. 4, Provincial Insolvency Act, before the Insolvency Court impugning the jurisdiction of the Official Receiver to dispose of the matter. The claim was allowed and confirmed in appeal. It was contended in Second Appeal that the only remedy against the Official Receiver's order was an appeal against his order under S. 68, and that no application lay under S. 4.

Held, (1) that the Official Receiver is only an executive officer and not a Court. 22 C. W. N. 704 referred to.

(2) that the Insolvency Court has inherent jurisdiction to set right Official Receiver's errors and has ample powers under S. 4.

47 Mad. 446 followed.

18 L. W. 282 distinguished.

1 Lah. 307 and A. I. R. 1932 Lah. 84 referred to.

V. Balasundaram Aiyar for Appellant.

N. S. Mani for Respondent.

K. C.

Madhavan Nair and Jackson, JJ. A. S. No. 63 of 1927.
17th January, 1933.

Security bond—Sale subject to security—Decree-holder proceeding against other properties of judgment-debtor—Suit against decree-holder and purchaser—Indemnity for judgment debt from purchaser—If entitled to—Limitation—Art. 132 or Art. 120 applicable.

A judgment-debtor executed a security bond in favour of the District Court in compliance with an order of the High Court making it a condition of stay of execution pending an appeal from the Lower Court's decree. The appeal was eventually dismissed. Before the decree could be executed by sale of the security properties, they were purchased by a third person in execution of another money decree, but the sale was made subject to the security. The former decree-holder instead of proceeding against the security properties sought to realise his decree amount from the other properties of the judgment-debtor. The legal representative of the judgment-debtor filed a suit against the decree-holder and the purchaser of the security properties claiming that he was entitled to an indemnity from the purchaser in respect of the judgment debt and praying that they may be sold and the proceeds applied in satisfaction of the balance of the decree debt and the surplus, if any, paid over to him to the extent of moneys already recovered from his estate in satisfaction of the decree.

Held, that such a suit was maintainable though the plaintiff had not paid up the whole amount of the decree, that the plaintiff was entitled to the indemnity claim and that the suit was governed by Art. 132 and not by Art. 120 as it was to enforce a charge by sale of the properties.

P. Venkataramana Rao and *V. S. Narasimhachari* for Appellant.

S. Varadachariar and *A. Ramachandra Aiyar* for Respondent.

S. V. V.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. C. M. S. A. No. 182 of 1931 and C. M. A. No. 481 of 1930.
18th January, 1933.

Mortgage—Prior mortgagee's suit without impleading puisne mortgagee—Subsequent mortgagee's suit without impleading prior mortgagee—Sale in consequence of decree in the suit preceding execution in prior suit—Prior purchaser entitled to retain possession.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee but only the mortgagor and before the sale in execution of the decree in such a suit the puisne mort-

N.R.C.

gagee brings a suit on his mortgage without impleading the prior mortgagee as a party and obtains a decree, and the mortgaged properties are sold in execution in both the suits, the prior purchaser in execution is entitled to retain possession, irrespective of the fact that the mortgage in execution of which such sale takes place is the prior or puisne mortgage.

40 Mad. 77 explained.

Case-law reviewed.

T. M. Krishnaswami Aiyar and *B. R. Chakravarthi* for Appellant in C. M. S. A. No. 182 of 1931.

T. R. Venkatarama Sastri and *M. S. Vaidyanatha Aiyar* for Respondent in C. M. S. A. No. 182 of 1931.

K. V. Sesha Aiyangar and *T. R. Ramachandran* for Appellant in C. M. A. No. 481 of 1930.

C. A. Seshagiri Sastri for Respondent in C. M. A. No. 481 of 1930.

K. C.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. C. R. P. No. 790 of 1931.

19th January, 1933.

Hindu Law — Minor — Suit for partition — Death of minor pending suit—Legal representative if can come on to continue the suit or the suit abates.

A mother instituted a suit for partition on behalf of her minor son against his coparceners alleging circumstances which if proved would have justified a decree in favour of the minor. The minor plaintiff however died before the suit came on for trial and the mother applied to be impleaded as his legal representative on the footing that the minor must be deemed to have become divided as from the date of the institution of the suit.

Held, that the guardian of the minor was entitled to act for him in expressing his intention to become divided from the rest of the family and that such expression of intention would become operative from the date of the institution of the suit, if the Court is satisfied that the suit was instituted for the benefit of the minor. It is immaterial that the minor dies before the passing of the preliminary decree as it is not the decree that effects the severance of status.

S. Varadachariar and *B. T. M. Raghavachariar* for Petitioner.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

S. V. V.

The Chief Justice and
Bardswell, J.
24th January, 1933.

L. P. A. No. 4 of 1930.

Civil Procedure Code (V of 1908), O. 22, R. 5—Legal representative—Claiming as legatee under a will, to be brought on record—Question of genuineness of will found by Judge sitting in admission—Letters Patent appeal against his order—Whether lies under Letters Patent, cl. 15.

Where in a pending first appeal the appellant died and a person who claiming to be the sole legatee under a will left by the deceased applied to be brought on record as his legal representative and was opposed, and an enquiry having been held by the Lower Court and the Judge sitting in admission having found the will genuine and directed under O. 22, R. 5, Civil Procedure Code, that the petitioner should be brought on record, the respondent in the appeal preferred a Letters Patent appeal,

Held, on a preliminary objection, that no appeal would lie under cl. 15 of Letters Patent, that the test laid down in 35 Mad. 1 at page 7 that the order to be appealable must "put an end to the suit or proceeding so far as the Court before which the suit or proceeding pending is concerned" was not satisfied in the present instance and hence no appeal would lie.

N. S. Srinivasa Aiyar for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasa Aiyangar* for Respondents.

K. C.

The Chief Justice and
Bardswell, J.
26th January, 1933.

L. P. A. No. 71 of 1932.

Madras Co-operative Societies Act (VI of 1932), S. 51—Director of Co-operative Bank also acting as its Vakil—Dispute between Bank and Vakil—Reference to Deputy Registrar—Validity—Writ of prohibition—Legal practitioner being Director of Society—Appearance as vakil of Society—Propriety—Madras Co-operative Societies Act (II of 1912).

The Director of a Co-operative Bank, who also acted as its legal adviser and Vakil, was called to account for certain sums of money received by him from the Bank while acting as its Vakil and he having failed to do so a reference was made by the Deputy Registrar of Co-operative Societies under S. 51 of the Madras Co-operative Societies Act, 1932.

Held, that the matters complained of related to the conduct of the Vakil acting as such and not as a member, officer or agent of

the Society and the Registrar had no jurisdiction to entertain the reference. Writ of prohibition issued.

Merely because a legal practitioner is a member of a society he is not prevented by any rule of professional etiquette from accepting instructions from the society of which he is a member. But the conduct of a person acting as paid legal adviser of a society and also as its Vakil while being a director is improper.

T. R. Venkatarama Sastri and *P. S. Narayanaswami Aiyar* for Appellant.

The Government Pleader (*P. Venkataramana Rao*) and *P. Govinda Menon* for Respondents.

B. V. V.

The Chief Justice and Bardswell, J. L. P. A. No. 296 of 1926.

26th January, 1933.

Civil Procedure Code (*V of 1908*), *S. 11*—Res judicata *between co-defendants—Essentials.*

In order that a decision may operate as *res judicata* between co-defendants (1) there must be a conflict of interest between them, (2) it must be necessary to decide that conflict in order to give the plaintiff the relief which he claims, and (3) the question between the defendants must have been finally decided.

53 All. 103 (P. C.) relied on.

T. R. Venkatarama Sastri and *L. P. Sivasubramaniam* for Appellant.

S. T. Srinivasagopalachari for Respondents.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 76 of 1929.
18th January, 1933.

Civil Procedure Code (V of 1908), O. 40, R. 1—Suit already disposed of—Receiver if can be appointed—Hindu Law—Suit by reversioner for injunction against widow—Court if entitled to appoint Receiver.

Where a reversioner filed a suit against a Hindu widow and certain relations of hers to whose name she had transferred the assets of her husband, for a declaration of his reversionership and injunction to restrain her from committing waste, the Court found the plaintiff was the reversioner, that the widow had committed waste and that the widow was doing it to the detriment of the reversioner, but held that an injunction would only result in making collection difficult and the appointment of a Receiver was alone the proper remedy and directed the plaintiff to apply for the appointment of a suitable person as a Receiver; whereupon, the plaintiff put in such an application on which the Court appointed a Receiver. On appeal the said order was reversed by the Lower Appellate Court on the ground that the Court, having already disposed of the suit, had no longer any jurisdiction to appoint a Receiver. Further, the suit being one for injunction and Receiver being a larger remedy than an injunction, it could not even have been decreed and could not therefore be granted on an application in such a suit.

Held, (1) that the appointment of a Receiver was the proper remedy under the circumstances;

(2) that though a Hindu reversioner was not entitled to possession during the lifetime of the widow and could never sue the widow for possession, he had the right to have a Receiver put upon the estate under circumstances threatening waste.

I. L. R. 44 M. 984 followed, and

(3) O. 40, R. 1, Civil Procedure Code, enabled the Court to appoint a Receiver even after the decree and the fact that the suit had been already disposed of did not take away the jurisdiction of the Court to appoint the Receiver.

Watrap S. Subrahmania Aiyar for Appellant.

A. K. Madhava Rao for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 10 of 1927.
23rd January, 1933.

Transfer of Property Act (IV of 1882), S. 101—Subrogation—Purchase of property subject to two mortgages—Purchaser directed

N.R.C.

to discharge both mortgages from out of the consideration for the purchase—Earlier mortgage alone discharged by purchaser—Suit by the later mortgagee—Priority in respect of the earlier mortgage—Purchaser, if entitled to plead.

Where the purchaser of a property was directed by the sale deed to discharge two mortgages and he discharges only one of them, the earlier, but fails to discharge the later mortgage, whereupon the later mortgagee files a suit for sale on his mortgage in which the purchaser pleads priority in respect of the earlier mortgage which he has discharged,

Held, that the purchaser is entitled to priority in respect of the earlier mortgage.

45 M. L. J. 693 explained and distinguished.

Watrap S. Subrahmania Aiyar for Appellant.

T. S. Venkateswara Aiyar for Respondent.

K. C.

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Madhavan Nair and Jackson, JJ. A. S. No. 131 of 1927.
26th January, 1933.

Charitable and Religious Trusts Act (XIV of 1920)—Petition under S. 3—Directions of Court under S. 5 not complied with by trustee—Permission granted by Court under S. 6 for filing a suit under S. 92, Civil Procedure Code—Subsequent suit under S. 92, Civil Procedure Code, by the petitioner and two others having no sanction—Petitioner and 3rd plaintiff withdrawing from the suit—If 2nd plaintiff alone competent to prosecute the suit.

The petitioner moved the District Court under Act XIV of 1920 for directions calling on the respondent (trustee) to furnish information regarding the trust. The directions called for by Court not having been complied with by the trustee, the petitioner and two others having no separate sanction filed the suit under S. 92, Civil Procedure Code. During the course of the suit, however, the petitioner and the 3rd plaintiff withdrew from the suit and the Sub-Judge held that the suit was not validly instituted as the other two plaintiffs had not the requisite sanction and as the petitioner and the 3rd plaintiff withdrew from the suit the 2nd plaintiff alone could not continue the suit; the section requiring at least two plaintiffs.

Held, that S. 6 of the Charitable and Religious Trusts Act generally authorised the institution of a suit under S. 92, Civil Procedure Code and had no reference whatever either to the *personnel* or the number of the plaintiffs bringing the suit and that the 2nd plaintiff was therefore perfectly competent to prosecute the suit.

P. R. Ganapathi Aiyar and *V. Krishna Mohan* for Appellant.

P. Somasundaram for Respondent.

S. V. V.

Beasley, C. J.
9th February, 1933.

C. R. P. No. 1930 of 1930.

Civil Procedure Code (V of 1908), S. 115, O. 21, Rr. 85 and 86—Court-sale—Auction-purchaser—Date of payment falling in summer recess—When amount should be paid.

When a Court-sale in execution of a decree was held before the Court closed for summer recess, but the 15th day for payment of balance under O. 21, R. 85 fell during the recess of summer,

Held, (1) that the auction-purchaser could pay the amount on the re-opening day after recess, *vide* S. 10, General Clauses Act;

(2) that the payment into Court consists of all the acts mentioned in the Civil Rules of Practice, *i. e.*, taking of the chalan, payment into Bank, filing Bank receipt into Court and taking a receipt from the Judge; and

(3) that Lower Court's order refusing to confirm sale was liable to be set aside in revision.

Y. Suryanarayana for Petitioner.

V. Govindarajachari for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ.
10th February, 1933.

A. S. No. 45 of 1927.

Cotton Duties Act (II of 1896), Ss. 6, 8, 9 and 10—Factory owner—Non-furnishing of returns and non-assessment of duty for 10 years—Right of Government to assess duty according to its best judgment and to recover duty for back years.

A mill producing cotton goods assessable (under the now repealed Cotton Duties Act II of 1896) to duty, did not furnish the statutory monthly returns and was not assessed to duty by the Government for a period of 10 years at the end of which period the Government suddenly called upon the mill-owner to furnish returns for 10 years. The mill-owner failing to make such a return, the Government assessed him at its own discretion and recovered the duty. The mill-owner sued to recover the duty collected, on the ground the assessment and levy were not justified by the Act.

Held, that in the absence of a return furnished by the assessee in accordance with the statute, assessment in accordance with the best judgment of the assessing authority was not illegal.

Held also, that the Act did not prohibit the recovery of duties which had not been assessed for a period of ten years.

K. V. Sesha Aiyangar for Appellant.

The Government Pleader (P. Venkataramana Rao) for Respondent.

K. C.

Burn, J. C. M. P. No. 336 of 1933.

13th February, 1933.

Civil Procedure Code (V of 1908), O. 32, R. 7—Pendency of appeal—Sale by guardian of minor (respondent's) properties purchased in Court auction—Purchaser applying to be impleaded as a party respondent in the appeal—Whether guardian's action was governed by the provision in R. 7 of O. 32—Sanction of Court when necessary.

Pending an appeal, certain creditors of the respondent obtained decrees against him and brought his properties to sale. One of them was a minor whose guardian purchased on his behalf in Court auction a few items of properties. Then on the guardian's application, the minor was impleaded as respondent in the appeal. The guardian sold the properties so purchased to a third person who applied to be impleaded as respondent in the appeal and the application being opposed on the ground that the sale by the guardian required sanction under O. 32, R. 7 of the Civil Procedure Code,

Held, that O. 32, R. 7 will apply only to an action taken by the guardian in the nature of a compromise or withdrawal or any agreement to that effect.

Held, further, that as the guardian sold the properties which were bought in Court auction, no sanction was necessary, though it might be otherwise if the decree, in execution of which they were purchased, was sought to be assigned.

41 M. L. J. 75 distinguished.

K. Bhashyam Aiyangar for Petitioner.

L. A. Govindaraghava Aiyar, P. S. Ramachandra Aiyar, K. S. Desikan, T. R. Srinivasan and *R. Desikan* for Respondents.

K. C.

Walsh, J. C. M. S. A. No. 132 of 1929.
27th January, 1933.

Agency Tracts Interest and Land Transfer Act (I of 1917)—Section 7 and rules framed thereunder—Rule 48 of the Ganjam and Vizagapatam Agency Rules—If Second Appeal lies.

No Second Appeal lies either under the Agency Tracts Interest and Land Transfer Act or under Rule 48 of the Ganjam and Vizagapatam Agency Rules against the judgment of the Agent to the Governor, Vizagapatam, in appeal against the decision of the Special Assistant Agent, Narasapatam, in an application to obtain an order of ejectment against a transferee on the ground that the same was in contravention of the provisions of the Agency Tracts Interest and Land Transfer Act.

B. Jagannadha Doss for Appellant.

V. Govindarajachari for Respondents.

K. C.

Pakenham Walsh, J. C. M. S. A. No. 70 of 1929.
31st January, 1933.

Provincial Insolvency Act (V of 1920), Ss. 4, 56 and 75—Hindu father—Insolvency—Decree for partition in suit filed by the sons after father's adjudication—Mortgage by father executed prior to adjudication found binding upon the sons—Application by mortgagee to have the mortgaged property sold by Official Receiver free of the mortgage—Official Receiver agreeing on grant of substantial concessions by the mortgagee—Sale—Objection by minor sons to delivery of possession—Purchaser if entitled to have obstruction removed—Mortgage debt binding upon the minor sons in the partition decree—Right, title and interest of father alone would pass to purchaser—Purchaser should bring a suit for possession of sons' shares—Second Appeal against the appellate order—If competent.

An undivided Hindu father was adjudicated insolvent. The mortgagee from the father applied in the Insolvency to have the property mortgaged sold free of his encumbrance and the property was advertised for sale. The undivided sons of the insolvent filed a suit for partition impleading the mortgagee and the Official Receiver in which an issue was raised as to the binding character of the mortgage. The Court found the mortgage was valid and binding on the minor sons and gave a decree for partition subject to the mortgage. Thereupon the Official Receiver applied to the Insolvency Court to sell the entire property including the sons' shares free of the mortgage in view of the fact that the mortgagee was prepared to forego a substantial amount by way of interest and the estate stood to gain also by the saving of the Court-

N.R.C.

fee and vakil's fee which it would have to bear if the mortgagee filed a regular suit on his mortgage. The Insolvency Court permitted the same. On the date of the sale the minor sons intervened with a petition before the Official Receiver praying for the exclusion of their shares from the sale. The petition was dismissed by the Official Receiver who had the entire property sold for the mortgage debt. The mortgagee himself purchased the property.

The purchaser applied for delivery of possession but was obstructed by the mother of the minor sons. Thereupon he applied for delivery of possession removing the obstruction under Ss. 4 and 56 of the Provincial Insolvency Act and O. 21, R. 95 of the Civil Procedure Code. The Insolvency Court (the Sub-Court) directed delivery removing the obstruction. But on appeal the District Court held that only the father's share passed by the sale and that anyhow the purchaser could not obtain possession of the sons' shares in an application under S. 4 but should have filed a regular suit.

On the contention that an application under S. 4 being incompetent no Second Appeal would lie to the High Court.

Held, (*i*) that the Second Appeal was competent.

9 P. 685 followed; 60 M. L. J. 167 distinguished.

(*ii*) that the sale having been held after the decree for partition, only the right, title and interest of the insolvent father can pass to the auction purchaser under the Official Receiver's sale, even though as a matter of fact what was intended to be sold was the entire property including the shares of the sons.

I. L. R. 44 Cal. 524 (P. C.) distinguished.

(*iii*) that the purchaser was not entitled to obtain possession of the sons' shares in an application under S. 4 of the Provincial Insolvency Act but that he must file a suit therefor.

I. L. R. 51 M. 567 followed, and

(*iv*) that though the provisions of O. 21, Civil Procedure Code, may not apply in terms to an Insolvency Court, that Court has powers analogous to that of O. 21, Civil Procedure Code and can execute its own orders.

Quaere: Whether an Insolvency Court has the right to adjudicate on the binding character of a debt contracted by a Hindu father so as to authorise the sale of the sons' shares also by the Official Receiver?

I. L. R. 54 M. 479 and I. L. R. 55 M. 558 considered.

Watrap S. Subrahmania Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S, No. 46 of 1927.
1st February, 1933.

Interest Act (XXXII of 1839)—Interest as damages—Usufructuary mortgagee stipulating to pay peishcush and land cess to Government—Mortgagee defaulted when mortgagor paid—Suit for recovery of damages by mortgagor for breach of stipulation—Whether interest payable on the amount so paid as damages from date of payment till date of suit.

In a suit by a mortgagor against a usufructuary mortgagee for damages for breach of the covenant in the mortgage to pay the peishcush and land cess payable in respect of the mortgaged lands, the mortgagor claimed interest on the amounts paid by him towards peishcush and land cess from dates of payment till the date of suit.

Held, the mortgagor was not entitled to any interest before suit as interest could not be allowed under S. 73 of the Contract Act by way of damages. Also the Interest Act did not apply, because the conditions necessary for the granting of interest under the Interest Act were not satisfied nor could the Court award interest by way of damages for wrongful retention of money under any general equitable jurisdiction.

Case-law reviewed.

50 Mad. 94 (F. B.), 31 L. W. 655 and 57 M. L. J. 662 (P. C.) followed.

26 I. C. 429, 21 I. C. 543, 7 M. L. T. 108 and 7 Ch. D. 494 referred to.

V. Govindarajachari and *N. Vasudeva Rao* for Appellant.

B. Jagannadha Doss for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. Nos. 59 and 157 of 1927.
14th February, 1933.

Registration Act (XVI of 1908), Ss. 17 and 49—Lease for agricultural purposes—Reduced to writing—Necessity for registration—Party objecting to admissibility—Suppression of document—Effect of S. 65, Evidence Act—Secondary evidence—If can be relied on—Sale by auction—Transaction when complete.

Plaintiff let out his lands for agricultural lease for seven years. The lease right was sold in auction and the 1st defendant's highest bid was duly accepted. Soon after auction, an auction list was signed by plaintiff's dewan. Next day a muchilika was executed by 1st defendant. Both these documents were with the plaintiff and he did not produce them. About a month later an agreement

was executed setting out the terms. Even prior to the last mentioned agreement the defendant was let into possession and the instalments of lease amount also were being paid. The Trial Court held that all the said three documents being reduced to writing were invalid for want of registration and were inadmissible in evidence:

Held, (*i*) that the lease transaction was complete in law on the acceptance of the defendant's bid at the auction and the relationship of landlord and tenant was constituted.

13 W. R. 4 (P. C.) and 28 M. L. J. 617 followed.

(*ii*) that the party raising objection as to non-registration having suppressed the documents himself, every presumption should be drawn against him and he cannot rely on secondary evidence consisting of admissions by the witness on the other side, as secondary evidence of terms is prohibited under S. 65 of the Evidence Act;

(*iii*) that having regard to the anterior conduct of parties and the auction and the execution of earlier documents, the later agreement was merely the record of a past transaction already completed and did not embody the transaction or constitute the lease deed between the parties and so did not require registration.

50 Cal. 338 (P. C.) referred to.

K. Rajah Aiyar, K. Venkateswara Aiyar and *K. S. Rajagopalachari* for Appellant.

Sir A. Krishnaswami Aiyar (*Advocate-General*) and *L. S. Veeraraghava Aiyar* for Respondent.

K. C.

Ramesam and Cornish, JJ. A. S. No. 26 of 1927.
3rd February, 1933.

Negotiable Instruments Act (XXVI of 1881), S. 43—Promissory note for Rs. 9,000—Executant contracted to receive and was paid only Rs. 2,000—Suit on the pronote—Whether decree can be given for the whole amount.

When the executant of a pronote executed a promissory note for Rs. 9,000 and contracted to receive and received only Rs. 2,000,

Held, that S. 43 of the Negotiable Instruments Act did not apply and there was no partial failure of consideration, as the promisor never expected to receive more than Rs. 2,000, and that the plaintiff was consequently entitled to a decree for the whole amount due under the pronote.

V. Suryanarayana for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondents.

K. C.

Chief Justice and Bardswell, J. C. R. Ps. Nos. 1335 to 1338 of 1928.
16th February, 1933.

Civil Procedure Code (V of 1908), S. 73 and O. 21, Rr. 84 and 85—Application for rateable distribution—Sale of property in execution of decree—Executing decree-holder obtained permission to bid and to set-off—Applications for rateable distribution filed after sale—Whether rateable distribution could be granted.

In execution of a decree, the decree-holder obtained permission from the Court to bid at the sale and to set-off the bid amount towards the decree debt. The properties of the judgment-debtor were put to auction and were knocked down in favour of the decree-holder for an amount which was less than the amount of the decree. A few minutes later, some persons who held decrees against the same debtor put in applications for rateable distribution of the sale proceeds.

Held, the assets should be deemed to have been realised *eo instanti* the sale was knocked down and to have been paid over to the decree-holder as he obtained permission to set-off. The applications for rateable distribution being later than the sale, there were no assets available for distribution at the time they were filed.

The decision of Ramesam, J., in 1930 M. W. N. 568 followed.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Petitioner.

P. Satyanarayana Rao for *V. Govindarajachari* for Respondent.

K. C.

N R C

Burn, J. Cr. R. C. No. 916 of 1932.
16th February, 1933.

Criminal Procedure Code (V of 1898), S. 423 (1) (c) and (d) —Powers of the Appellate Court in security proceedings—Ordering a de novo *trial without jurisdiction.*

Where in security proceedings under S. 107, the trial Magistrate directed that security should be taken but the Sessions Judge in appeal set aside the trial Court's judgment as defective and ordered a *de novo* trial,

Held, in revision. that the learned Sessions Judge could only either alter or reverse the trial Court's order. under S. 423 (1) (*c*), but could not order a *de novo* enquiry and that the learned Sessions Judge's order for *de novo* enquiry was without jurisdiction.

Held also, that in view of the observations of the learned Sessions Judge in his judgment, the consequential order under S. 423 (1) (*d*), in the circumstances, is to direct a mere re-hearing.

K. Kuppuswami for Petitioners.

The Public Prosecutor for the Crown.

S. V. V.

Lakshmana Rao, J. C. R. P. No. 1551 of 1929.
17th February. 1933.

Civil Procedure Code (V of 1908), O. 33, Rr. 7 and 15—Application to sue in forma pauperis*—Prior application dismissed summarily for failure to comply with the order of Court—Whether operates as a bar.*

Where a prior application for leave to sue *in forma pauperis* filed by the wife of a Mohamedan who was alleged to be of unsound mind as his next friend was dismissed after notice to the respondent-defendant and after hearing the vakils on both sides but without taking any evidence, for default of the petitioner to produce a medical certificate from the District Medical Officer, which the Court required for satisfying itself that the husband was of unsound mind and that the wife might bring the suit as his next friend and subsequently another application was filed by the wife on behalf of her husband, to the entertainment of which the dismissal of the prior application was pleaded as a bar,

Held, the dismissal of the prior application was only a summary dismissal and did not operate as a bar to the entertainment of the second application.

I. L. R. 50 Mad. 63 followed.

T. S. Vaidyanatha Aiyar for Petitioner.

Watrap S. Subrahmania Aiyar for Respondent.

K. C.

Ramesam and Cornish, JJ. A. S. No. 299 of 1926.
1st February, 1933.

Principal and surety—Time to creditor—What it means—Surety when discharged.

A surety is discharged if, without his assent, the creditor binds himself by agreement with the principal debtor to give him time. And, with reference to the discharge of a surety, giving time means putting it out of the power of the creditor to sue the debtor during the extended time.

3 M. & G. 258 and (1899) 2 K. B. 256 relied on.

K. Rajah Aiyar, V. Ramaswami Aiyar and *R. Seturama Sastri* for Appellant.

S. T. Srinivasagopalachariar, S. Parthasarathy and *V. K. Tiruvenkatachari* for Respondents.

S. V. V.

The Chief Justice and Bardswell, J. C. R. P. No. 1055 of 1928.
21st February, 1933.

*Limitation Act (IX of 1908), Ss. 19 and 21—Wife of a lunatic—*De facto *manager of husband's properties—Whether competent to acknowledge debt of her husband to third party.*

The wife of an insane person who was in *de facto* management of his affairs and had applied but not been appointed under the Indian Lunacy Act as his guardian and manager, was not competent to acknowledge a debt due by her husband in favour of a third party and was not therefore " an agent duly authorised on his behalf " within the meaning of S. 19 of the Indian Limitation Act nor " a lawful guardian, committee or manager " within the meaning of S. 21 of the said Act.

108 I. C. 529 (Mad.) followed.

24 M. L. J. 428 not followed.

G. Ramakrishna Aiyar for Petitioner.

S. Ramaswami Aiyar for Respondent.

K. C.

Sundaram Chetty, J. C. R. P. No. 14 of 1932.
24th February, 1933.

Court-Fees Act (VII of 1870 as amended in Madras), Art. 17-B of Sch. II—Suit for partition—Prior division in status—Plaintiff in joint possession—Suit incapable of valuation—Rendition of accounts should be valued under S. 7 (iv) (f).

In a suit for partition where the trend of the plaint is that though severance in status was effected there was no actual division

by metes and bounds but, on the other hand, the plaintiffs and defendants were in joint possession, the suit is for division and separate possession of the plaintiffs' share as against the other tenants-in-common and the claim falls under Art. 17-B of Sch. II of the Court-Fees Act.

64 M. L. J. 24 followed.

The additional prayer for rendition of accounts of the movables and jewels will fall under S. 7 (*iv*) (*f*).

T. M. Krishnaswami Aiyar and *A. Nagaswami Aiyar* for Petitioner.

B. Sitarama Rao and *T. Krishna Rao* for Respondents.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 223 of 1926.
6th March, 1933.

Mortgage—Usufructuary mortgagee—Right of sale—Need for express covenant—Construction of covenant in deed of mortgage.

An usufructuary mortgagee as such has no right to institute a suit for sale of the mortgaged property but must only continue to enjoy the same till redemption. But if in the mortgage deed there is a personal covenant to pay the money a suit for sale may be instituted. Any such covenant, however, should be clear and unconditional in the undertaking to pay. Where a deed of usufructuary mortgage provided for the payment of a portion of the principal money and the interest out of the income of the property and further provided that in respect of the balance the mortgagors were liable to pay after the final taking of accounts on the responsibility of the mortgaged property,

Held, that there was no personal covenant to pay the balance of the mortgage money so as to sustain a suit for sale of the property in realising the same.

39 Mad. 1010 and 1918 M. W. N. 672 referred to.

B. Sitarama Rao and *K. P. Sarvothama Rao* for Appellant.

K. Y. Adiga and *K. Srinivasa Rao* for Respondents.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 157 of 1929.
6th March, 1933.

Hindu Law—Joint family property—Throwing into common stock —Proof of intention—Admission made in deed—Effect.

Where property inherited from a maternal grandfather was allowed by a Hindu son to be managed by his father along with the other family properties and in a deed of mortgage executed by the father and son the property inherited by the son was offered as security along with other ancestral lands and the son therein made an admission that the said property belonged to him and his father as of right,

Held, that the son could under those circumstances be taken to have thrown his separate property into the common stock of the family properties.

29 All. 184 referred to.

K. Kameswara Rao for Appellant.

K. Ramamurthi for Respondent.

B. V. V.

Curgenven and Sundaram Chetty, JJ. A. S. No. 124 of 1927.
7th March, 1933.

Mortgage—Usufructuary mortgagee—Deposit of prior mortgage amount—Withdrawal of amount before redemption—Interest set off against gross profits—Usufructuary mortgagee not obtaining possession—Claim for compensation—Transfer of Property Act (IV of 1882), Ss. 67, 68, 76 and 83.

A third usufructuary mortgagee made a valid deposit of the mortgage money under S. 83 of the Transfer of Property Act and on the second usufructuary mortgagee improperly refusing to take it sued him for redemption. He however withdrew the deposit amount from Court and spent it and was unable to re-deposit the amount.

Held, on the question of mesne profits, that the plaintiff was entitled to the gross profits against the second mortgagee under S. 76 (*i*), Transfer of Property Act, but was liable to pay some reasonable interest for his having had the use of the money; such interest however might be set off against the gross profits payable to him.

A prior usufructuary mortgagee resisting redemption can claim to add only such amounts to the redemption money as he could insist on if he had brought a suit for sale under Ss. 67 and 68 of the Transfer of Property Act.

Where a second mortgagee holding for a term of fifteen years did not get possession for a period of two years by reason of his own default in not tendering or depositing the mortgage money to the first mortgagee from whom he was asked to obtain possession,

N. R. C.

Held, that he could not claim compensation for not being put in possession of the property or claim to add it to the redemption money; nor could the term of the mortgage be extended by the period for which he was out of possession so as to make it run from the date he got possession.

K. S. Sankara Aiyar for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondent.

B. V. V.

Burn, J. Cr. R. C. No. 742 of 1932.
9th March, 1933.

Criminal Procedure Code (V of 1898), Ss. 145 and 146—Possession proceeding—Appointment of receiver—Order when can be made.

A Magistrate has no jurisdiction to appoint a receiver in a proceeding under S. 145, Criminal Procedure Code. A receiver can be appointed in possession proceedings only after a final order attaching the disputed property is made under S. 146 of the Code.

T. V. Ramanatha Aiyar for Petitioner.

K. G. Srinivasa Aiyar for Respondents.

The Public Prosecutor (L. H. Bewes) on behalf of the Crown.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 130 of 1929.
13th March, 1933.

Civil Procedure Code (V of 1908), S. 47 and O. 21, R. 100—Mortgage suit—Puisne mortgagee impleaded—Plaintiff obtaining decree and purchasing property—Puisne encumbrancer pleading paramount title in execution—Sustainability.

Where in a mortgage suit a puisne encumbrancer was impleaded as party and the plaintiff having obtained a decree brought the property to sale and himself purchased it and the puisne encumbrancer subsequently applied under S. 47 and O. 21, R. 100, Civil Procedure Code, seeking to obtain re-delivery of possession of the property by virtue of a paramount title vested in him,

Held, that the plea of paramount title could not be raised in the execution proceeding at the instance of a person who was a party to the mortgage decree. S. 47 of the Code refers to proceedings in execution based on the decree and does not apply to a case where the judgment-debtor seeks to alter the effect of the decree.

32 Cal. 265 relied on.

S. Nagaraja Aiyar and *J. R. Alwar Naidu* for Appellant.

K. V. Srinivasa Aiyar for Respondent.

B. V. V.

Ramesam and Cornish, JJ. A. S. No. 80 of 1931.
1st March, 1933.

Registration Act (XVI of 1908), S. 23—"Claiming under"—Adopted son by an authority to adopt—Widow if estopped from disputing the adoption—Notes of evidence before Sub-Registrar—Admissibility of in evidence.

Per *Ramesam, J.*—An adopted son is a person claiming under the power to adopt within the meaning of the Registration Act. As the effect of re-registration of a power to adopt is to date back to the original registration, an adoption made prior to the re-registration but after the first registration is valid from the beginning and there is no need to have recourse to a fresh adoption. The widow who made an adoption under a power to adopt put forward by her is estopped from denying the existence of the power and questioning the validity of the adoption.

The statements of attesting witnesses to a document made before the Sub-Registrar in the course of registration are admissible in evidence when the attestors are dead, under S. 32 (7) and S. 158 of the Evidence Act though not under S. 33 of the Evidence Act. Under S. 23, Registration Act, the original presentation for registration and the subsequent one for re-registration need not be in the same capacity.

"Not duly empowered" in S. 23 means "not entitled to present" and should not be restricted to cases of defective representation by persons entitled to present.

Per *Cornish, J.*—The summary of evidence noted by the Registrar is admissible in evidence under S. 35, Evidence Act.

Obiter.—Adoptive son in S. 60 of the Registration Act is the adopted son.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* with *H. Suryanarayana* for Appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar), B. Satyanarayana, K. Bimasankaran and *S. Venkatachalam Pillai* for Respondents.

S. V. V.

Ramesam and Cornish, JJ. A. S. No. 326 of 1927.
9th March, 1933.

Acknowledgment—Admission of execution before Sub-Registrar—If amounts to—Age of defendant given in the plaint—Mere denial of its correctness in the written statement—If enough.

N. R. C.

Where the plaint gives the age of certain defendants in the plaint to show that they were minors at the time of the acknowledgment in question, and the written statement, without giving the correct age according to the defendants, merely states that the defendants were majors at the time, it may indirectly involve denial of the correctness of the age in the plaint, but will not do as an adequate pleading.

The admission of execution before a Sub-Registrar within four months of the execution of the document is to make the document operative and shows that the man is anxious to admit his liability under the document. It is not merely the execution that he hereby admits but admits also the contents of the document and thereby the liability on it.

Case-law discussed.

K. Kuppuswami for Appellant.

M. Patanjali Sastri for Respondent.

S. V. V.

The Chief Justice and Bardswell, J. C. R. P. No. 1260 of 1932.
14th March, 1933.

Civil Procedure Code (V of 1908), S. 115—Court-fees—Order in favour of plaintiff—Revision to High Court—Maintainability—Right of Government to prefer revision—Government of India Act, S. 107.

Where an order in regard to Court-fees happens to be in favour of the plaintiff the High Court will not interfere by way of revision either under S. 115, Civil Procedure Code, or under S. 107, Government of India Act. The fact that the petitioner is the Government and not the defendant does not alter the position.

56 M. L. J. 302, 56 M. L. J. 394 and 29 C. W. N. 627 followed.

Quaere: Whether the Government not being a party to a suit can prefer a revision to the High Court against an order as to Court-fee made in the suit.

The Government Pleader (P. Venkataramana Rao) for Petitioner.

R. Kuppuswami Aiyar for Respondent.

B. V. V.

Lakshmana Rao, J. C. R. P. No. 88 of 1930.
23rd March, 1933.

Limitation Act (IX of 1908), Ss. 19 and 20—Decree—Absence of provision for interest—Payment as for interest—Receipt—If saves limitation.

A decree was silent as to payment of interest. But the judgment-debtor was alleged to have passed a receipt as having paid Rs. 2 towards interest.

Held, the receipt will be an acknowledgment within the meaning of S. 19 of Limitation Act and even otherwise payment of interest operates as an admission of an existing debt which is due.

K. S. Desikan for Petitioner.

G. S. Venkatraman for *G. Gopalaswami* for Respondent.

S. V. V.

Anantakrishna Aiyar, J. C. R. P. No. 1004 of 1928.
24th March, 1933.

Civil Procedure Code (V of 1908), O. 21, R. 2—Statement of adjustment in execution petition—Adjustment not certified—If can be relied upon.

O. 21, R. 2 does not bar an enquiry into an uncertified adjustment when the same is referred to by the decree-holder himself in his execution petition and the judgment-debtor only wants to rely upon it in defence.

30 L. W. 526 followed.

R. Sundaralingam and *K. Raghavachari* for Petitioner.

K. S. Desikan for Respondent.

S. V. V.

Cornish, J. C. R. P. No. 291 of 1930.
24th March, 1933.

Civil Procedure Code (V of 1908), O. 33, R. 1 proviso—Suit for redemption—Leave to sue in forma pauperis*—If value of equity of redemption to be taken into consideration.*

Where the plaintiff applied to sue as a pauper in a suit to redeem a mortgage,

Held, the equity of redemption is the subject-matter of the suit, and its value must not be taken into consideration in deciding the question whether the plaintiff is entitled to sue as a pauper.

33 All. 237 distinguished.

20 M. L. J. 121 relied on.

T. R. Gundappa Rao for Petitioner.

A. Srirangachari for Respondent.

K. C.

N. R. C.

Pandalai, J. S. A. No. 493 of 1930.
28th March, 1933.

Construction—Deed by a Sudra—"Santhathi" if includes illegitimate sons—Heritable estate.

In a settlement deed executed by a Sudra in favour of his son, the words were "I have made a settlement of the undermentioned properties to you. You shall enjoy the income thereof during your lifetime and after your death your male santhathi or adopted santhathi shall take (it). Even if there should be no male santhathi but only female santhathi, such female santhathi shall take. During your lifetime you have no right whatever to sell or mortgage the above properties".

Held, that the words conferred a heritable estate on the son, that the words "settlement" is used as equivalent to "gift," and that there were no words in the deed taking away the heritable estate conferred above.

33 Cal. 23 (P. C.) followed.

The questions raised in the Court below, viz., whether the term "Santhathi" would include illegitimate children when used in a deed executed by a Sudra and whether the principles of 55 Mad. 1 (P. C.) would apply discussed but left open.

S. T. Srinivasagopalachariar and *T. D. Srinivasa Chariar* for Appellant.

C. Padmanabha Aiyangar and *T. E. Ramabhadra Chariar* for Respondent.

S. V. V.

Madhavan Nair and Jackson, JJ. Appeal No. 314 of 1927.
29th March, 1933.

Transfer of Property Act (IV of 1882), S. 101—Mortgagee purchaser—Money decree—Execution of—Sale in execution of mortgaged properties—Claim petition by mortgagee purchaser—Dismissal of—Failure to file a suit within one year—Effect of—Mortgage if revives—Proclamation subject to a mortgage—No enquiry into mortgage—Purchaser—If can question the mortgage.

Where a mortgagee purchases a part of the mortgaged properties in consideration of the mortgage amount and where there are no mesne encumbrances, the mortgage is extinguished under S. 101 of the Transfer of Property Act and it cannot be revived by reason of the fact that in proceedings for sale of the mortgaged properties in execution of a simple money decree against the mortgagor, a claim petition put in by the mortgagee-purchaser on the strength of his sale deed is dismissed as too late and the claim order is allowed to become conclusive, no suit being brought within a year to set aside the claim order.

39 All. 178 (P. C.) and 52 Mad. 465 distinguished.

Where a sale proclamation under O. 21, R. 66, Civil Procedure Code, recites that the properties put up for sale are subject to a mortgage but where there is no enquiry into the subsisting nature of the mortgage or any order of Court to have the properties sold subject to the mortgage under O. 21, R. 62, Civil Procedure Code, what is put up for sale is not merely the equity of redemption and the auction-purchaser is not estopped from questioning the mortgage.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *B. Jagannadha Doss* for Appellant.

C. S. Venkatachariar and *K. R. Rama Aiyar* for Respondent.

S. V. V.

Pakenham Walsh, J. S. A. No. 201 of 1929.
30th March, 1933.

Madras Abkari Act (*I of 1886*), *S. 28—Default of abkari contractor—Sale of immovable property—Bidder failing to make deposit—Re-sale of property—Liability of bidder for loss—Omission of selling officer to disclose encumbrance—Effect—Rule of* Caveat emptor—*Applicability—Madras Revenue Recovery Act* (*II of 1864*), *Ss. 36, 37 and 38.*

Where the Government put up for sale the house of an abkari contractor who had committed default and the defendant knocked down the property at the auction for a certain price but did not deposit the necessary amount and thereupon the Government re-sold the property and sued the defendant for the loss caused by the re-sale but the latter pleaded that the prior sale was vitiated by the fraud of the selling officers in having told him that there was no encumbrance while the property was really encumbered,

Held, that the Government could recover from the bidder the difference between the bid at the first sale and the price fetched at the re-sale with any encumbrance amounts due at the time of the re-sale added to the latter figure.

Applicability of the rule of *Caveat emptor* discussed.

16 Cal. 535, 25 Cal. 99 and 41 Mad. 474 referred to.

T. R. Venkatarama Sastri and *M. S. Vaidyanatha Aiyar* for Appellant.

The Government Pleader (*P. Venkataramana Rao*) for Respondent.

B. V. V.

Curgenven and Sundaram Chetty, JJ. A. S. No. 403 of 1930.
31st March, 1933.

Mortgage — Subrogation — Partition deed — Allocation of liability in respect of debt—Indemnity clause—Covenant running with land—Liability of purchaser with notice—Award of interest by way of damages—Transfer of Property Act (IV of 1882), S. 40.

Subrogation can be claimed by a purchaser whose money is applied for the purpose of paying off a mortgage decree though the hand that deposited it in Court is that of the vendor who was himself the mortgagor and not that of the purchaser. Though the payment is only a partial payment of the decree still if by reason of it, the mortgage decree is wiped out and no balance is left subrogation can be claimed.

11 Mad. 343, 38 Mad. 548 and 55 M. L. J. 369 referred to.

A later purchaser or mortgagee who undertakes to discharge two prior encumbrances but pays only one cannot resist the claim of the unpaid encumbrancer by setting up the discharge of the other encumbrance as a shield or claim priority for the amount paid in discharge.

6 C. L. J. 134 referred to.

Where in a deed of partition between brothers it was agreed that each should discharge specified portions of a mortgage decree binding on all of them and that if any one was obliged to pay more than his share, the other shares were liable for the loss,

Held, (1) that the stipulation was in the nature of a restrictive covenant annexed to the ownership of the property and could be enforced under S. 40, Transfer of Property Act, against a purchaser of the property with notice;

41 All. 417 and 8 Ir. Eq. 526 relied on.

(2) that such a purchaser could not claim any priority or right of subrogation in respect of the amounts paid by him towards the discharge of the mortgage decree;

53 Mad. 188 referred to.

and (3) that interest by way of damages could be decreed under the covenant in order to indemnify the party who paid the amount for the actual loss suffered by him.

15 Ch. D. 400 referred to.

C. S. Venkatachari for Appellant.

B. Sitarama Rao, C. A. Seshagiri Sastri and *S. R. Muthuswami Aiyar* for Respondents.

B. V. V.

Sundaram Chetty, J. C. R. P. No. 1359 of 1932.
31st March, 1933.

Civil Procedure Code (V of 1908), O. 21, R. 90—Application under—Undischarged insolvent—Locus standi *to apply.*

Where the properties of the judgment-debtor who had been adjudicated an insolvent had been sold in execution of a mortgage decree against him without impleading the Official Receiver as a party to the proceedings and the judgment-debtor (insolvent) applied to set aside the execution sale under O. 21, R. 90, Civil Procedure Code,

Held, in revision, that he had a *locus standi* to maintain the application, especially as the Official Receiver was not made a party to the execution proceedings and that he was a person whose interests were "affected by the sale" within the meaning of the rule.

13 L. W. 616 and A. I. R. 1926 Mad. 959 followed.

49 Mad. 461 (F. B.) distinguished.

R. Rajagopala Aiyangar for Petitioner.

K. S. Rajagopala Aiyangar, R. V. Raghava Thathachariar and *R. Srinivasan* for Respondents.

S. V. V.

Cornish, J. C. R. P. No. 463 of 1930.
7th April, 1933.

Contract—Sale of land—Payment of 'bayana' *by vendee—Default of vendee to perform contract—Advance if forfeited.*

Where under a contract for the sale of certain immovable property the vendee paid a certain sum of money as '*bayana*' to the vendor but the vendee failed to perform his part of the contract within a reasonable time and thereupon the vendor conveyed the property to a third person and performance of the original contract was consequently frustrated,

Held, that what was paid by the vendee as '*bayana*' was earnest money, that it was forfeited owing to his default and he was therefore not entitled to recover the same.

Howe v. *Smith*, (1884) 27 Ch. D. 89 at 101 and 50 M. L. J. 629 (P. C.) referred to.

A. Lakshmayya for Petitioner.

P. Panini Rao for Respondent.

B. V. V.
N R C

The Chief Justice, Bardswell and Burn, JJ. C. R. P. No. 1331 of 1930.
12th April, 1933.

Criminal Procedure Code (V of 1898 as amended), S. 476-B—Appeal in civil proceeding—Power of High Court to remand case for further inquiry.

In an appeal under S. 476-B, Criminal Procedure Code, in respect of a civil proceeding the appellate court has the power to remand the case to the lower court for further inquiry.

Case-law discussed.

Ch. Raghava Rao for Petitioner.

P. Satyanarayana Rao for Respondents.

B. V. V.

Curgenven, J. C. R. P. No. 1256 of 1930.
12th April, 1933.

Civil Procedure Code (V of 1908), Sch. II, para. 14—Partition suit—Reference to arbitration—Division of properties incomplete—No application objecting to award by aggrieved party before decree—Decree by Court in terms of award—Whether High Court can interfere in revision.

Where a decree had been made by Court in terms of an award between parties to a suit for partition of joint family properties and one of the parties afterwards complained of the award having been incomplete regarding the division of certain items, on the question whether the High Court could interfere in revision under S. 115, Civil Procedure Code,

Held, that if the petitioners desired to take exception to the award on the score of its incompleteness, they had an opportunity to do so before the decree was passed. They should take the award with all its defects, now that the opportunity afforded them to object to it had gone by. The mere circumstance that the petitioners might have put themselves into an awkward situation would not give the Court jurisdiction and power to extricate them, which it did not otherwise possess.

29 Cal. 167 and 38 Mad. 256 followed.

19 I. C. 405 referred to.

M. Patanjali Sastri for Petitioner.

T. M. Krishnaswami Aiyar and *T. D. Srinivasachariar* for Respondents.

K. C.

Krishnan Pandalai, J. S. A. No. 388 of 1929.
10th April, 1933.

Contract Act (IX of 1872), S. 63—Scope—Suit on a pro-note —Defendant's plea that plaintiff agreed to take a lesser sum and remit balance of debt—Whether such agreement valid and binding.

Where the plaintiff instituted a suit for Rs. 4,000 on the basis of a promissory note and the defendant pleaded that the plaintiff agreed to take Rs. 1,830 and remit the balance of the debt in view of the fact that other creditors of the defendant consented to take lesser amounts,

Held, that an agreement to take lesser amount and remit the balance is valid under S. 63 of the Contract Act.

6 Rang. 191 dissented from.

53 Mad. 127: A. I. R. 1929 Mad. 794 doubted and distinguished as a case of a mortgage.

55 M. L. J. 1 (P. C.) relied on.

B. Somayya and *A. Lakshmayya* for Appellant.

Ch. Raghava Rao and *M. Sriramamurthi* for Respondents.

S. V. V.

Madhavan Nair, Jackson and
Lakshmana Rao, JJ. A. S. No. 574 of 1931.
11th April, 1933.

Hindu Religious Endowments Act (1927), S. 84—Petition to District Judge against order of the Board—Appeal to High Court, if competent.

Where the Endowments Board declared a temple to be a non-excepted temple under S. 84 (1) and an application was preferred to the District Court to modify the order under S. 84 (2), the order of the District Judge on that application is not appealable as a decree, inasmuch as the order is passed on an *application* and not in a *suit.*

V. V. Srinivasa Aiyangar and *K. Sankara Sastri* for Appellant.

P. Venkataramana Rao (Ag. Advocate-General) for Endowments Board.

B. Govindan, R. Sundaralingam and *S. G. Rangaramanujam* for other Respondents.

S. V. V.

N. R. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 299 of 1927.
11th April, 1933.

Evidence Act (I of 1872), S. 92—Agreement for sale—Collateral oral covenant—Vendee to be permitted to sell to others and to discharge debts of vendor and pay over balance remaining—Later agreement between the same parties to discharge the claims under the earlier agreement—Admissibility of the former oral agreement in evidence—Even in case of non-admissibility of earlier agreement, whether it can still form good consideration for the later agreement.

The appellant sued the respondent for the recovery of a certain sum of money on the ground that the appellant sold her properties to the respondent by a registered sale deed with a collateral oral agreement that he (respondent) might in his turn sell them to others and after discharging certain debts due by her, pay over to her any balance left. The respondent sold the properties in his turn to others and the appellant alleged that the suit amount represented the balance so left after discharging debts. Subsequently there was a litigation to which the appellant, the respondent, the vendees from the respondent and others were all parties. The respondent wanted the appellant's help in that matter to support his vendees. The appellant alleged that there was an agreement as a result of a mediation, that the respondent should pay appellant a sum of Rs. 4,000 in discharge of her claims on the earlier agreement. The suit was based alternately on both the agreements. The trial Court held that the oral agreement was inadmissible in evidence under S. 92 of the Evidence Act in the face of the sale deed by the appellant to the respondent and the agreement being inadmissible in evidence could not form good consideration for the later agreement.

Held, that the oral agreement, though not admissible in evidence, could form good consideration for the later agreement. The test was what had been in the minds of parties at the time. If the claim was made *bona fide* and the later agreement was entered into to discharge that claim the legal validity or invalidity of the claim was beside the point.

1918 A. C. 869 at 873, 32 Ch. D. 266, L. R. 5 Q. B. 449 and 31 Mad. 474 followed.

K. Bhashyam Aiyangar, T. R. Srinivasan and *R. Desikan* for Appellant.

N. S. Srinivasa Aiyar for Respondent.

K. C.

Krishnan Pandalai, J. S. A. No. 215 of 1929.
19th April, 1933.

Will—Properties set apart for charities—"Family heirs" mentioned, who were to be in management of the trust—Minor heir suing senior in management for partition and possession of his half share in management and for accounts—Construction of document—Dedication to trust and not charged merely with charity—Minor heir's right to sue—Whether such a suit falls within S. 92 of the Civil Procedure Code.

A will of a Hindu testator appointed certain persons as his " family heirs " and directed the performance by them of certain public charities out of those properties set apart by the testator and maintenance of the said " family heirs " were to be met from the surplus and that the balance, if any, ought to be constituted into a fund for the purchase of additional properties for the charity. The plaintiff, a minor heir, sued the senior heir in management for partition and possession of one-half of the suit properties and for accounts on the footing that he had a beneficial interest in the properties.

Held, (1) that a proper construction of the will would read that the properties were dedicated to the charitable trust and not merely burdened with the performance of the charity;

(2) that the plaintiff was entitled to enforce his right of management of the trust and for separate possession of the property in this suit for partition;

(3) that the rights of a plaintiff to be himself a trustee or to a share in the management of a trust were all individual rights, the enforcement of which fell outside the scope of S. 92, Civil Procedure Code.

54 Mad. 1011, 45 Mad. 113 and A. I. R. 1927 Mad. 820 followed.

B. Sitarama Rao and *M. S. Lakshminarasa Aiyar* for Appellant.

K. Sankara Sastri and *V. Ratnam* for Respondents.

K. C.

Madhavan Nair and Jackson, JJ. A. S. No. 35 of 1928.
25th April, 1933.

Hindu Law—Adoption—Daughter's consent if necessary—Selection from " agnates or sagotrajas "—Not too general a consent—Nearest sapinda's consent capriciously withheld—If obligatory to consult next nearer sapindas—Family council if should be summoned.

N. R. C.

A Hindu widow adopted her husband's uterine brother's son without consulting a step-daughter who had also sons living. The father of the adopted boy was also one of the nearest sapindas of the husband. There was another equally near sapinda who had been applied to for his consent but had refused successive registered letters and given no reasons for or against the adoption. There were two sapindas of the next degree and two more in a degree further remote. Of these the first two had not been consulted but the other two had taken part in the adoption ceremony and attested the adoption deed. The natural father had given a formal deed of permission authorising the widow to adopt a boy either " from agnates or sagotrajas ". On a suit by the step-daughter impeaching the validity of the adoption,

Held, that (1) the consent was to choose from a class " either agnates or sagotrajas " and was therefore not too general to be bad. 26 Mad. 681 distinguished.

(2) The daughter need not be consulted in the circumstances. 43 Mad. 876 is still good law. 20 L. W. 503 and 49 Mad. 652 discussed and distinguished.

(3) The refusal of the registered letters knowing their contents was a capricious refusal of permission to adopt.

(4) It is no doubt obligatory on the part of the widow to consult the nearest sapindas; but if their consent is capriciously withheld, it is not necessary that a family council should be held to consider the propriety of the adoption, or that the reversioners should be consulted in the order of their degree of relationship to the deceased husband, or that even all the reversioners should be consulted. It is not necessary that each and every reversioner should be consulted or that if one or two are omitted from consultation the adoption is invalid. The reason for assent is, as given in 12 M. I. A. 397, 1 Mad. 174 and 43 Mad. 650, to see if it was not done by capricious motives by the widow.

S. Varadachariar for *K. Kameswara Rao* for Appellant.

P. Somasundaram for Respondent.

S. V. V.

Madhavan Nair and Jackson, JJ. A. S. No. 426 of 1927.
25th April, 1933.

Contract—Agreement to receive lesser sum in satisfaction—How far can be proved—Contract Act, S. 63—Evidence Act, S. 92.

If *A* lends *B* Rs. 1,000 at 10 per cent. reducing these terms to the form of a document and at the end of the year *B* can pay only Rs. 50 by way of interest, then *A* can if he likes take Rs. 50 as in full settlement of interest up to date and that can be proved by *B*.

But the parties may agree that the rate is changed to 5 per cent. but then that cannot be proved by *B* unless the alteration is committed to writing. *Cf.* 54 Mad. 829.

T. M. Krishnaswami Aiyar for Appellant.

S. Ranganatha Aiyar and *K. S. Venkatrama Aiyar* for Respondents.

S. V. V.

Krishnan Pandalai, J. C. M. S. A. No. 149 of 1930.
25th April, 1933.

Civil Procedure Code (V of 1908), O. 21, R. 11—Indian Limitation Act, S. 182, cl. (5).

Where an Execution Petition was filed against a minor judgment-debtor represented by his guardian who had been dead prior to the Execution Petition,

Held, that notwithstanding the representation of the minor by a dead guardian it was an application in accordance with law, and constituted a step-in-aid of execution.

A. I. R. 1931 Lah. 636 and 4 Pat. L. T. 54 approved and followed.

17 Mad. 76 referred to.

Kasturi Seshagiri Rao for Appellant.

V. Govindarajachari for Respondent.

K. C.

Walsh, J. S. A. No. 1261 of 1928.
26th April, 1933.

*Transfer of Property Act (IV of 1882), S. 52—Mortgage to a Co-operative Rural Credit Society—Proceedings by Society before Assistant Registrar—Award passed by Registrar directing sale of mortgaged properties—Filing of award in Civil Court having jurisdiction over properties—Sale by mortgagor to a third person after execution proceedings by the Society were started—Purchaser in private sale not made a party to the execution proceedings by Society—Sale and purchase by Society of properties brought to sale in execution—Purchaser in private sale suing for redemption of mortgage—*Lis pendens—*Assistant Registrar, whether a Court—Co-operative Societies Act (II of 1912)—Rules under—Civil Procedure Code, S. 141—"Proceedings" meaning different from the same word occurring in S. 52 of the Transfer of Property Act—Powers of Registrar to pass a mortgage decree—Effect of.*

After certain properties were mortgaged to a Co-operative Rural Credit Society, the Society took proceedings before the Assistant Registrar of Co-operative Societies who passed an award

directing the sale of the properties for the amount due under the mortgage. The Society then filed an award in the Court having jurisdiction over the properties for executing the decree. After execution proceedings were started, the mortgagors sold the properties to another person, who was not made a party to execution proceedings. Ignoring the execution proceedings which culminated in the sale of the properties by the Society and purchase by itself, the purchaser in private sale instituted a suit to redeem the mortgage. It was contended for the Society that the sale by the mortgagors was affected by *lis pendens* under S. 52 of the Transfer of Property Act and the execution proceedings were final.

Held, (*a*) the Assistant Registrar of Co-operative Societies is a Court and the proceedings before him under R. 14 of the Rules framed under the Co-operative Societies Act are proceedings before the Court within S. 52 of the Transfer of Property Act.

59 M. L. J. 229, 45 Cal. 585, 24 Mad. 121, 36 Mad. 72 at 89 and 47 All. 374 at 376 considered and relied on.

37 Mad. 107, 15 I. C. 652 (F. B.), A. I. R. 1932 Mad. 350 at 403 (F. B.), 30 Mad. 326 and 50 Mad. 121 at 124 distinguished.

(*b*) The meaning of the term "proceedings" in S. 141, Civil Procedure Code, is different from the meaning of the same term in S. 52, Transfer of Property Act.

(*c*) Though S. 52, T. P. Act, may not in terms apply, its principle should be applied.

(*d*) Lis can start even after decree in certain cases. *See* 39 C. W. N. 366 and 31 M. L. J. 839.

(*e*) The award when put into Civil Court for execution has all the force of a decree passed by the Civil Court.

4 Bom. 34, 27 C. W. N. 666, 46 Bom. 128 and A. I. R. 1926 Lah. 547 followed.

40 Cal. 219 and 64 M. L. J. 341 (P. C.) distinguished.

Quaere. Whether the Registrar of Co-operative Societies can pass a mortgage decree.

(*f*) Even if the Registrar has no power to pass such a decree the remedy of the aggrieved party is by way of a suit to set aside the award and the executing Court has no jurisdiction to go behind the decree and consider its validity.

Leave to appeal granted.

T. L. Venkatarama Aiyar for Appellant.

K. Bhashyam Aiyangar, B. R. Chakravarthi and *T. R. Srinivasan* for Respondents.

K. C.

Krishnan Pandalai, J. C. M. S. A. No. 156 of 1930.
26th April, 1933.

Limitation Act (IX of 1908), Art. 181 — Preliminary decree on mortgage—Subsequent final decree—Appeal by mortgagor as well as second appeal—Decree in favour of mortgagee affirmed —After decision of second appeal legal representative of mortgagee decree-holder applying for a fresh final decree—Period of limitation for such an application—Application of such a kind, whether lies.

A person obtained a preliminary decree on a mortgage on the 7th December, 1918 and, pending an appeal by the mortgagor, he obtained also a final decree on 28th April, 1919. Meanwhile the appeal was dismissed and subsequently a second appeal to the High Court was also dismissed on the 6th April, 1923. On the 5th March, 1926, the present appellant, who was brought on record as the legal representative of the decree-holder respondent in the second appeal mentioned above, applied for the passing of a fresh final decree on the basis of the decree of the High Court.

Held, even though the decree of the High Court in second appeal was in affirmation of the Lower Court's decree, the decree-holder has the right to apply for a final decree within three years from the date of decree in the second appeal under Art. 181 of the Limitation Act, and the fact that there was already a final decree based on an inconclusive preliminary decree does not affect his right to apply for a final decree on the basis of the appellate Court's decree.

39 All. 641 (F.B.) ; 6 Pat. 24 (P. C.) ; 8 Lah. 253 (P. C.) ; 5 Lah. 257 ; 37 L. W. 557 and 58 M. L. J. 207 referred to.

R. Desikan for Appellant.

T. V. Muthukrishna Aiyar and *R. Vaidyanatha Aiyar* for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 40 of 1928.
27th April, 1933.

Hindu Law—Will—Oral will—Proof of—Consent of sapinda to adoption—Conditional on payment—Validity of—Consent under the impression that husband had authorised—Not enough.

Only the clearest and most cogent proof should be accepted of a nuncupative will.

62 M. L. J. 23 and 12 M. I. A. 1 relied on.

Where plaintiff, a sapinda, made it a condition of granting his consent to an adoption by the widow to her husband that he should

N. R. C.

be given a substantial sum of money, the refusal is from corrupt motives and the widow is justified in acting upon the consent of the agnates next in order.

In order that a consent of sapindas may enable a widow to adopt, it must be an independent consent, given in the exercise of a judgment uninfluenced by extraneous considerations. In particular, if that judgment is affected by a belief that the husband has given an authority to adopt, a consent so procured will not be independent and will not avail to render an adoption made in pursuance of it valid.

30 Mad. 50 (P. C.) and 26 Mad. 627 followed.

K. Kuppuswami for Appellant.

K. Krishnaswami Aiyangar for Respondent.

S. V. V.

Ramesam, J. C. R. P. No. 460 of 1930.
2nd May, 1933.

Madras Village Courts Act (I of 1889), S. 18—Suit on a promissory note in the Village Munsif's Court—Omission to sue for principal and balance of interest—Fresh suit in District Munsif's Court for balance of the claim omitted—Barred.

Where a person sued in a Village Munsif's Court for a portion of the interest due on a promissory note and omitted to sue for the principal and the balance of the interest but afterwards brought a suit in a District Munsif's Court for the balance of his claim,

Held, that the second suit was barred by S. 18 of the Madras Village Courts Act.

29 M. L. J. 474 distinguished and doubted.

S. Ramaswami Aiyar for Petitioner.

E. R. Balakrishnan for Respondent.

K. C.

[END OF VOL. LXIV.]

BAR COUNCIL'S INSTRUCTIONS.

Instructions issued by the Madras Bar Council for the guidance of legal practitioners and embodied in its resolution, dated 2nd April, 1933:—

1. Regular accounts in bound books, *viz.*, a day book and a ledger, should be maintained by every practitioner regarding the daily receipts and disbursements of the moneys of his clients.

2. The fees for each case should be settled at the earliest opportunity and, wherever possible, such settlement should contain

NOTE TO BINDER.

Substitute this for the corresponding pages in 64 M.L.J.

the amount received is capable of allocation or appropriation.

3. Moneys received or drawn from Court by a practitioner on behalf of his client should be paid without delay to the client who should be intimated by post immediately after such receipt and where the client does not turn up, the money should be remitted to the client's address by postal money order. If for any reason the money cannot be so paid or remitted to the client, the same should be invested in the Post Office Savings Bank at the place in the name of the practitioner, provided that, where the amount exceeds the limit prescribed by the postal rules to the investment in the Savings Bank Account, the excess should be invested in any other bank in the locality.

4. Practitioners should avoid arrangements by which clients' moneys in their hands are converted into loans. But in no case should such conversion be made without the previous consent in writing of the client.